(297)

153

Putland, *a Minor, under the Age of 21 rs, Son and Heir of* Thomas Putland, *e of the City of* Dublin, *Merchant, de- s'd, by* Jane Putland, *Widow, his ther and next Friend, and the ſaid* ne Putland, *and* Richard Helſham, *ctor of Phyſick, Executors of the Laſt ll and Teſtament of the ſaid* Thomas tland. } Appellants.

Sir Walter Burrowes, *Bart. Reſpondent.*

The Appellants CASE.

SIR *Kildare Burrowes* being ſeiſed in Fee of the Mannor, Town and Lands of *Caſtletown Omy*, lying in the *Queen*'s County, and the Town and Lands of *Grange Mellon* and *Giltown* in the County of *Kildare* in the Kingdom of *Ireland*, with their ſeveral Subdenominations and Appurtenances, did, together with his Wife Dame *Elizabeth Burrowes*, by Deeds of Leaſe and Releaſe bearing Date the 10th and 11th Days
June of *June* 1700, in Conſideration of 3000 *l.* really and *bona fide* paid unto him the ſaid Sir *Kildare* by *Thomas Putland*, Grandfather of the Appellant *John*, grant and convey all and ſingular the ſaid Lands and Premiſſes unto the ſaid *Thomas Putland*, and his Heirs, ſubject to a Proviſo of Redemption on Payment of the ſaid 3000 *l.* and Intereſt at 8 *per Cent. per Ann.* by the ſaid Sir *Kildare Burrowes*, his Heirs and Aſſigns, at the End of ſeven Years from the Date thereof. In which Deed of Releaſe are contained Covenants for levying Fines, and ſuffering common Recoveries, and making further Aſſurances, with other uſual Covenants, which Deeds are witneſſed by *Robert Johnſton*, late one of the Barons of the Exchequer in *Ireland*, and Brother-in-Law to the ſaid Sir *Kildare*.

Fines were levyed, and Recoveries had and ſuffered of the Premiſſes, to the Uſes in
ni. the ſaid Deed of Releaſe mentioned.

The ſaid *Thomas Putland*, ſen. being ſo ſeiſed of the ſaid Mortgaged Premiſſes, did on the Marriage of *Thomas Putland*, jun. his eldeſt Son, Father of the Appellant *John*, with the Appellant *Jane*, Daughter of *John Rotton*, in Conſideration of the ſaid Marriage, and of a conſiderable Portion received with her, by Deeds of Leaſe and Releaſe bearing
Aug. Date reſpectively the 10th and 11th Days of *Auguſt* 1708, grant and convey the ſaid Premiſſes *(inter alia)* to *John Rotton* and *Edward Ryly*, and their Heirs, to the Uſe of the ſaid *Thomas Putland*, jun. for Life, Remainder to the firſt and every other Son of the ſaid *Thomas Putland*, jun. on the Body of the ſaid *Jane* to be begotten, and the Heirs Male of their Bodies, with other Remainders over, ſubject to a Proviſo, that if the Mortgage Money ſhould be paid, the ſame ſhould be laid out in the Purchaſe of Lands by the ſaid *Rotton* and *Ryly*, the Truſtees, to be ſettled to the ſame Uſes.

The ſaid Sir *Kildare* paid ſeveral Sums of Money in Part of the Intereſt of the ſaid Mortgage, and continued in the Poſſeſſion of the Mortgaged Premiſſes till his Death, which happened in *March* 1708-9, leaving the Reſpondent Sir *Walter*, his Son and Heir, who, after his Father's Death likewiſe paid ſome Money at ſeveral Times, in Part of the Intereſt of the ſaid Mortgage, but there being a very conſiderable Arrear due,

Thomas Putland, the Appellant *John*'s Father, the 15th of *January* 1710, exhibited his
y, Bill in the Chancery of *Ireland* againſt the Reſpondent Sir *Walter*, Dame *Elizabeth* his Mother, and alſo againſt *John Lyons*, Eſq; who claimed the ſaid Lands of *Grange Mellon*, Part of the ſaid Mortgaged Premiſſes, by virtue of two Leaſes, under the yearly Rent of 140 *l. per Ann.* and prayed, the Money due upon the ſaid Mortgage might be paid, or that the Equity of Redemption of the Reſpondent Sir *Walter* might be foreclоſed.

The Reſpondent Sir *Walter*, then a Minor, by his Guardian *Martin Tucker*, Eſq; and the ſaid *John Lyons* anſwered the ſaid Bill jointly, and the Reſpondent Sir *Walter* admitted his Father had borrowed Money from the Appellant's Grandfather, and executed ſuch Mortgage as in the Bill, that the Eſtate was come to him, but inſiſted, his Father had made ſome Settlement of the ſaid Premiſſes upon him, and did not know whether the ſame was ſubject to the ſaid Mortgage, and the ſaid *John Lyons* inſiſted on his Leaſe of *Grange Mellon*, Part of the ſaid Mortgaged Premiſſes.

The Reſpondent Sir *Walter* having arrived at his full Age, and the ſaid *John Lyons* having (pending the ſaid Suit) aſſigned over his Intereſt in the ſaid Premiſſes to Sir *John St. Leger*, one of the Barons of the Exchequer.

The Appellant *John*'s ſaid Father the 22d Day of *January* 1716, exhibited a Supplemen-
y, tal Bill againſt the Reſpondent and the ſaid Baron *St. Leger*, and prayed, a Diſcovery of
ir what pretended Settlements were made of the Premiſſes by the Reſpondent's ſaid Father, and when, to whom, and on what Condition the ſame were made, and inſiſted, that if he had made any Settlement on the Reſpondent his Son and Heir, the ſame was voluntary, and could not affect his Mortgage, nor the then Plaintiff's Title thereto, he being a Purchaſer for a valuable Conſideration without Notice of any Settlement, and likewiſe inſiſted, that whatever Settlements were made, the ſame were barred by the ſaid Fines levyed, and the ſaid Recoveries ſuffered upon the Execution of the ſaid Mortgage, and therefore prayed, the Reſpondent might redeem or be foreclоſed.

The

29 *Aug.* 1718. The Reſpondent four Years after he came of full Age, put in his Anſwer on or about the 19th of *Auguſt* 1718 to the ſaid Bill, and thereby inſiſted, that the ſaid Mortgaged Premiſſes were by ſome Deed prior to the ſaid Mortgage for a valuable Conſideration ſettled upon him in Remainder, and that his ſaid Father had no Power to make ſuch Mortgage, and that therefore the Reſpondent was not in any Manner liable to the Payment of the Money ſo borrowed upon the ſaid Mortgage, he being by ſuch Settlement only Tenant for Life of the Mortgaged Premiſſes; but whether the ſeveral Uſes by the ſaid Settlement limitted were barred by the ſaid Fines and Recoveries, ſubmitted to the Court, but the Reſpondent did not take upon him to ſay by his ſaid Anſwer, that he believed the then Plaintiff had Notice of ſuch Settlement; and Baron *St. Leger* put in his Anſwer to the ſaid Bill, inſiſting on the Aſſignment of the Leaſes to him from *Lyons*.

The Appellant's ſaid Father having replied, and Iſſue being joined, and the Rules for Publication paſſed, no Witneſſes were examined in the ſaid Cauſe for the Reſpondent, either to prove the pretended Settlement, or any Copy or Notice thereof, tho' he applied for and obtained a Commiſſion to examine his Witneſſes, but the then Plaintiff proved the Execution of the Deeds of Mortgage and the Settlement made upon his Marriage,

21ſt & 22d *Feb.* 1718. and the ſaid Cauſe came to a Hearing before the Lords Commiſſioners for hearing and determining Cauſes in the ſaid High Court of *Chancery* in *Ireland*, in the Abſence of the Lord Chancellor.

It was then decreed, that the then Plaintiff *Tho. Putland*, and the Reſpondent Sir *Walter Burrows*, ſhould go to an Account before *Edward Lyndon*, Eſq; one of the Maſters of the ſaid Court, and that the ſaid Baron *St. Leger* ſhould account for his Rent of ſuch Part of the ſaid mortgaged Premiſſes, as were held by him, and all Parties to have juſt allowances, and after the Maſter's Report, the Court would conſider whether the Appellant's Father ought not to have his Coſts, and would make ſuch further Order as ſhould be juſt.

That ſeveral Proceedings were had before the ſaid Maſter in the ſaid Account, and when the Maſter was ready to make his Report, the Reſpondent petitioned the Lord Chancellor, ſetting forth, that he was informed, his Father, Sir *Kildare Burrows*, had upon his Marriage entred into Articles for ſettling the mortgaged Premiſſes, whereby he was to be only Tenant for Life, That after the Marriage took Effect, a Settlement was made, purſuant to the ſaid Articles, That ſubſequent to that Settlement, his Father borrowed 3000*l.* from *Thomas Putland*, for which he mortgaged the Premiſſes to him. That *Thomas Putland* his Son, had brought his Bill againſt the Reſpondent, to redeem or be foreclоſed, and that though the Reſpondent had by his Anſwer inſiſted his Father had no Power to mortgage the Premiſſes; yet not being able to prove it, a Decree was pronounced againſt him; but being now informed the ſaid *Tho. Putland* had Notice of the ſaid Articles and Settlement before the Money lent, and that he did not doubt to prove the Execution of the ſaid Articles and Settlement, therefore prayed the Cauſe might be reheard, which was order'd accordingly.

Nothing in this mentioned in his Anſwer.

20 *January*, 1719.

N. B. Though the Reſpondent pretends he had but lately had Notice of theſe Articles and Settlement, yet they are charged by him in a Bill brought in the Year 1709, againſt *Siſſon* and the Mortgagees, and to which they put in their Anſwers; but no farther Proceedings were had, ſo that the Reſpondent muſt have had Notice long before.

At the ſame Time, the Reſpondent filed a Bill of Diſcovery againſt the ſaid *Tho. Putland*, Father of the ſaid Appellant *John*, and thereby ſet forth, That upon his Father's Marriage with the Reſpondent's Mother, Articles were entred into, whereby the mortgaged Premiſſes were to be ſettled upon the ſaid Reſpondent's Father for Life, Remainder

1690. as to Part, to the ſaid Reſpondent's Mother for Life, Remainder to the firſt and every other Son of that Marriage in Tail Male, with ſeveral other Remainders over; and that

1693. purſuant to the ſaid Articles, after the ſaid Marriage took Effect, a Settlement was made accordingly. That *Thomas Putland*, who lent the Reſpondent's Father 3000*l.* upon a Mortgage of the ſaid Premiſſes, and his Agents had Notice of the ſaid Articles and Settlement before any Money was lent, and the ſaid Articles and Settlement were delivered to the Mortgagee, to be by him cancelled. That *Thomas Siſſon*, who was Agent for the Mortgagee, in an Anſwer to a Bill exhibited againſt him during the Reſpondent's Infancy, had admitted he had Notice of ſuch Articles, and ſeen the ſame, that *John Rotton* had Copies thereof delivered to him, and full Notice of the ſame, before the Intermarriage of his Daughter with the Appellant *John*'s Father. That the ſaid *Thomas Putland*, jun. and the Truſtees in his Marriage Settlement, had, before the ſaid Marriage, Notice of the ſaid Articles and Settlement, and therefore prayed the Defendants might diſcover the ſame, and the ſaid Anſwer might be made uſe of at Rehearing of the original Cauſe.

The Reſpondent afterwards obtained an Order to put off the Rehearing 'till the then Defendant ſhould anſwer the ſaid Bill, and upon a ſubſequent Application amended his Bill, and prayed Relief as well as Diſcovery.

16 *June* 1720 To this Bill the ſaid *Thomas Putland* put in his Plea and Anſwer, and by his ſaid Anſwer denied that he at any Time before his Marriage, or that the ſaid *John Rotton*, or any Truſtee in his ſaid Marriage Settlement, to his Knowledge or Belief, had any Notice or Intimation of the ſaid Articles made on the Marriage of the Reſpondent's Father, or of any Settlement made purſuant to ſuch Articles in the Bill mentioned; nor did he ever hear or believe there were any Articles entred into, whereby the Reſpondent's Father was to be Tenant for Life of the Premiſſes, with Remainder over to his firſt and every other Son; and that if the ſaid Sir *Kildare Burrowes* had made any Settlement, limiting the Premiſſes to the Reſpondent in Tail after the Death of the ſaid Sir *Kildare*, the ſame was voluntary, and could not affect his Mortgage, who was a Purchaſer, without Notice for a valuable Conſideration, and had a good Right thereto both at Law and in Equity; and deny'd the Charges in the Bill from *Siſſons* Anſwer, for that *Siſſon* ſwore the ſaid Articles contained no Limitation to the Iſſue of the Marriage, and were made after Marriage; and as to ſo much of the Bill as prayed a Diſcovery of any Articles or Settlements, or Copies thereof, or any Deeds relating to the mortgaged Premiſſes, and to bring

bring the ſame into Court, he pleaded his ſaid Marriage Settlement, and that he was a Purchaſer for a valuable Conſideration, without Notice to him or any Perſon acting for him on his ſaid Marriage.

That the ſaid Plea was argued the 12th and 13th Days of *July*, 1720, and it being inſiſted, That tho' the then Defendants denyed any Manner of Notice or Intimation to him or his Truſtees, or that they ſaw the ſaid Articles; yet it being charged, the Defendant's Wife's Father had a Copy of theſe Articles delivered to him before the Marriage of the Defendant, the Defendant ſhould have denyed that, and therefore it was ordered, that the ſaid *Thomas Putland*, jun. ſhould amend his Anſwer and Plea, but the Reſpondent having petitioned for and obtained a Rehearing of the ſaid Order, the ſame was reheard on the 11th of *November*, 1720, and the ſaid Plea over-ruled; but the Reſpondent never proceeded farther in that Suit, nor inſiſted upon a farther Anſwer, tho' the Apellant's Father lived near five Months after the Plea over-ruled.

That before any further Proceedings were had in the ſaid Cauſe, *Thomas Putland*, jun. dyed about the 31ſt Day of *March*, 1721, leaving the Appellant *John* his Son and Heir by the Apellant *Jane*, by which the ſaid Cauſe abated; but before his Death the ſaid *Thomas Putland* made his Will in Writing, and made the Appellants, *Jane* and Dr. *Helſham*, Executors, who proved the ſaid Will.

That the Appellants the Executors, being intitled to all the Arrears of Intereſt of the ſaid Mortgage due at the Death of the ſaid Teſtator and Appellant *John*, to the Principal Money thereby ſecured by Virtue of the ſaid Settlement upon his Father's Marriage, they, in *April* 1722, filed their Bill of Revivor againſt the Reſpondent Baron *St. Leger*, the Biſhop of *Clogher*, Executor of *John Rotton*, deceas'd, and *Mary Ryly*, Executrix, and *James Ryly*, Son and Heir of the ſaid *Edward Ryly*, deceas'd, who was the ſurviving Truſtee of the ſaid Marriage Settlement of *Thomas Putland*, jun. and prayed the ſaid Proceedings might be revived, and that the Appellants being intitled to the ſaid Mortgage-Money and Intereſt might have the Benefit of the ſaid Decree in 1718, and to have an Account of the ſaid Mortgage Money and Intereſt thereof, and that the Arrears of Intereſt due in the Lifetime of the ſaid *Thomas Putland*, jun. might be paid to the Appellants *Jane* and *Richard*, and that the principal Money might be laid out at Intereſt, to the Uſes of the ſaid Settlement, and that the Truſtees might act in the ſaid Truſt, or aſſign their Truſt, as the Court ſhould direct, and be relieved.

The Reſpondent anſwered and therein inſiſted on the Marriage Articles made on his ſaid Father's, Sir *Kildare Burrows*'s Marriage, and previous to his Marriage with Sir *Walter*'s Mother *Elizabeth*, dated *Febr.* 15, 1690, and of the ſaid Settlement, dated the 16th and 17th of *February*, 1693, and that the ſaid Sir *Kildare* had no Power to make ſuch Mortgage.

All the other Defendants anſwered.

The Appellants replyed, to avoid the ſaid Anſwers being taken for true, but gave Notice, that no Witneſſes would be examined in Regard that all that was inſiſted on in the Reſpondent's Anſwer to the laſt Bill, had been in Iſſue in the former Pleadings before the Decree.

That the Reſpondent examined *Robert Johnſon*, who was a ſubſcribing Witneſs to the Deed of Mortgage, and *Robert Dixon* as to the Execution of the ſaid Articles and Settlement, and they only ſwear they had heard ſome Articles were entred into before the ſaid Sir *Kildare*'s Marriage, but neither of them ever ſaw them; and that Sir *Kildare* told Deponent *Johnſon*, they were not executed 'till after his Marriage, tho' they bear Date before.

That Publication, having paſſed the ſaid Cauſe, came to a Hearing on the 2d and 4th of *December*, 1724; and altho' Objections were made by the Appellant's Council to the reading the Depoſitions taken on the Behalf of the Defendant in that Cauſe, becauſe they were examined to a Matter which was in Iſſue before the ſaid Decree, and altho' no Proof had been made or ſo much as attempted to be made of Notice to the ſaid *Thomas Putland*, jun. or any other Perſon acting on his Behalf, before the Settlement of the Premiſſes in Queſtion upon his Marriage.

It was decreed to try at Law whether any, and what Deed of Settlement was executed by Sir *Kildare* in 1693, of the Lands in the Mortgage in the Pleadings mentioned, or any of them, in Purſuance of any and what Articles, or for any other and what Conſiderations, and what were the Uſes of ſuch Settlement, and if any ſuch Deed or Articles were executed, to whom the ſame or either of them are come, and to try whether *Thomas Putland*, ſen. *Thomas Putland*, jun. or the Truſtees in the Settlements made on the ſaid *Putland*, junior's, Marriage, or any Perſon or Perſons that tranſacted the Marriage of the ſaid *Putland*, jun. with the Daughter of *John Rotton*, deceas'd, or any or which of them had Notice of ſuch Articles or Settlement at the Time of the ſaid Marriage, or at any other Time and when, *and to be tryed by a Jury of the County of* Kildare, where the Reſpondent had great Power and Intereſt, and the Parties to be at Liberty to give in Evidence the Depoſitions of ſuch Witneſſes as ſhould be dead, or for any other lawful Cauſe to be made out by Affidavit, could not appear; and if a ſufficient Jury ſhould not appear, the Judge was to grant a *Tales*.

Againſt which Decree and the Order for rehearing the Cauſe after the Decree made the 23d of *February*, 1718. the Appellants have appeal'd for theſe Reaſons.

It is admitted, the Appellant *John*'s Grandfather, really and *bona fide* lent and advanc'd to the Reſpondent's Father, the Sum of 3000 *l.* at 8 *l. per Cent.* Intereſt, which was 2 *per Cent.* leſs than the then common Intereſt in *Ireland*, that for ſecuring the Repayment thereof, the Mortgage in Queſtion was executed; and that the ſaid Sum of 3000 *l.* with a great Arrear of Intereſt, remains unpaid, the Appellant therefore, as an honeſt Creditor, without Notice, was intitled to all the Aſſiſtance of a Court of Equity, to compel Payment of the Money ſo lent, and the ſame ought to have been decreed accordingly.

Becauſe

II. Becauſe the Mortgaged Premiſſes were before the Intermarriage of the Appellant *John*'s Father to the Appellant *Jane*, and in Conſideration thereof, and a Marriage Portion conveyed to Truſtees to the Uſe of the Appellant's Father for Life, Remainder to the firſt, and every other Son of that Marriage; ſo that the Appellant's Father was, and the Appellant *John* is a Purchaſer of the Premiſſes in Queſtion for a valuable Conſideration, he ought to have the Benefit thereof in order to recover Payment of the Money really due, unleſs it were plainly proved that the Mortgager had no Title to convey, and that the Appellant's Father had Notice thereof before the Settlement; and it was impoſſible the Appellant *John* could have Notice, he being then unborn.

III. The Reſpondent, by his Anſwer to the Original Bill, brought by the Appellant's Father, and likewiſe to the Supplemental Bill, inſiſted, his Father was only Tenant for Life of the mortgaged Premiſſes by Settlement for a valuable Conſideration, and had no Power to mortgage the ſame, and tho' Publication was at his Deſire frequently enlarged, and a Commiſſion granted to examine Witneſſes, yet no Proof of ſuch Settlement or Deed was brought, and thereupon a Decree made in Appellant's Father's Favour, conſequently no Reaſon afterwards to direct an Iſſue to try whether ſuch Articles or Settlement were executed.

IV. It ſeems to be a Matter of a very dangerous Conſequence after Publication paſſed and a Cauſe heard, and a Decree pronounced, and a Bill of Revivor brought upon the Death of one of the Parties, to allow a Defendant to bring Evidence to ſupport the Facts of his Anſwer, which are the ſame in Subſtance with what he had formerly inſiſted upon, and was in Iſſue in the former Cauſe, and to which he had examined no Witneſſes before, and was the more extraordinary in this Caſe, becauſe the two Witneſſes examined by him ſince, were Mr. *Johnſon* and Mr. *Dixon*, both his Uncles, who are both not only his Relations, but intimate Acquaintance, and from whom he might have had the ſame Diſcovery in the firſt Cauſe, and who no Doubt might have been then examined had there not been ſome private Reaſon for delaying ſuch Examination 'till after Publication paſſed, eſpecially ſince it appears by the Reſpondent's own Bill that he was informed of theſe Tranſactions long before, they being all charged in a Bill brought by the Reſpondent againſt *Putland*, Sen. and *Siſſon*, in the Year 1709, and tho' they both anſwered and inſiſted theſe two Witneſſes were privy to the Appellant's Father's Mortgage, and to the Tranſactions relating thereto, yet no farther Proceedings were had in that Cauſe, nor any Attempt to examine theſe Witneſſes 'till after the Death of Appellant's Grandfather and Father, and *Siſſon*, who tranſacted the Mortgage in Queſtion: tho' the Reſpondent charges both the ſaid *Johnſon* and *Dixon* were Parties to this pretended Settlement.

V. That even theſe Witneſſes don't prove the Execution of the Articles inſiſted upon by the Reſpondent, or that either of them were Witneſſes thereto, or that they ever ſaw the original Articles or any Copy of them, or know the Contents thereof, but ſay they have heard Articles were executed, and heard they were delivered up to the Mortgagee and cancelled; and tho' both of the Witneſſes refer to the Anſwer of the ſaid *Siſſon* as the Reaſon of their Belief as to the Articles and Delivery thereof to the Mortgagee, it is plain they differ intirely from the Anſwer itſelf, both as to the Nature of the Articles and the Delivery of them to the Mortgagee; the Articles, as he ſets them forth, being only a Proviſion for the preſent Maintenance of the ſaid *Kildare* and his Lady, during the Life of Sir *Walter*, the Grandfather of the Reſpondent, and a Joynture for the Lady, but no Limitation to the Iſſue of the Marriage, and were executed after Marriage: And therefore is no ſufficient Evidence to direct an Iſſue againſt a Purchaſer for a valuable Conſideration, eſpecially ſince *Johnſton* ſwears the Reſpondent's Father told him theſe Articles were not executed 'till after Marriage, tho' they did bear Date before; and *Johnſton* himſelf is a ſubſcribing Witneſs to the Mortgage made by the Reſpondent's Father to the Appellant's Grandfather, which was not very juſtifiable, if he knew the Mortgager had no Title: And *Siſſon*, by his Anſwer, ſwears both *Johnſton* and *Dixon* were the Perſons who perſwaded *Putland* to lend the Money, and that the Title was good.

VI. It ſeems very ſtrange to leave it to a Jury to try the Limitations of Uſes in Articles whereof no Copy is produced, nor the Original, nor any Copy is proved to be extant, nor any Witneſs that ever ſaw them.

VII. That the Appellants apprehend, that the directing an Iſſue to try whether the Appellant *John*'s Father, had any Notice of theſe Articles, is contrary to the uſual Courſe of Proceedings in a Court of Equity, when the Party upon whom Notice is pretended does expreſly, upon Oath, deny he had any Notice, and not the leaſt Proof is made by the Reſpondent to falſify that Anſwer, or Attempt to prove Notice upon the Appellant's Father, for neither of the two Witneſſes examined do ſo much as ſay, they believe the Appellant's Father had Notice of the ſaid Articles; and the Appellants apprehend, if he had no Notice, all the other Enquiry will be fruitleſs, and to no Purpoſe.

The Appellants therefore humbly hope the ſaid Decree of the 4*th of* December *laſt, ſhall be reverſed, and that the Reſpondent ſhall be decreed to redeem the Appellant or be abſolutely foreclоſed, and the Appellants have ſuch other Relief as to your Lordſhips ſhall ſeem meet.*

C. Wearg.
Tho. Latwyche.